**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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UNITED STATES OF AMERICA,

-against-

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

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**MEMORANDUM OF DECISION AND ORDER**

Cr. No. 02-485 (ADS) (ARL)

**APPEARANCES**

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**SPATT, District J.**

This is an application for bail pending sentencing. On May 19, 2005, Nat Schlesinger ("the Defendant") was convicted by a jury on thirty of thirty one various counts of arson, conspiracy, insurance fraud, creditor fraud, and money laundering. Following the verdict, the Defendant's bail was revoked and he was remanded. On May 23, 2005, the Defendant filed an application for bail pending sentencing, which included substantial collateral in addition to the original bail package. The Defendant argued that (1) he is not a flight risk; (2) he will waive extradition from Canada or Israel; (3) he has a substantial likelihood of success on a motion for acquittal, new trial, or for reversal on appeal; and (4) exceptional circumstances justify the Defendant's release pending sentence. For the reasons set forth below, the Court finds that the Defendant has not met his burden to permit his release on bail pending sentencing.

## I. Discussion

Generally, a defendant who has been convicted and is awaiting sentence must be detained unless the court finds by clear and convincing evidence that the defendant is unlikely to flee or pose a danger. 18 U.S.C. § 3143(a)(1) (2005); see United States v.

Londono-Villa, 898 F.2d 328, 329 (2d Cir. 1990) (holding that the district court's finding by clear and convincing evidence that defendant did not pose flight risk pending sentence was clearly erroneous). The provisions of section 3143(a) are activated immediately upon a finding of guilt. United States v. Bloomer, 967 F.2d 761, 763 (2d Cir. 1992). The statute states, in relevant part:

> (a) Release or detention pending sentence.
> (1) Except [involving crimes of violence], the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

18 U.S.C. § 3143.

However, where the conviction involves a crime of violence, such as arson, section 3143 further provides that a defendant must be detained unless the court finds that "there is a substantial likelihood that a motion for acquittal or new trial will be granted." 18 U.S.C. § 3143(a)(2); see United States v. McAllister, 974 F.2d 291, 292–93 (2d Cir. 1992) (reversing release order and revoking bail). That part of section 3143 states:

> (2) The judicial officer shall order that a person who has been found guilty of an offense [involving a crime of violence as] described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

> (A) (i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
>
> (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
>
> (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3143(a)(2) (emphasis added).

Section 3143(a)(2) "is a more stringent test than the one that applies to individuals who have been convicted of non-violent crimes, which requires only that the judge find by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." United States v. Lea, 360 F.3d 401, 403 (2d Cir. 2004). Arson, one of the crimes that the Defendant has been convicted of in this case, "is a crime of violence . . . for which a maximum term of imprisonment of 10 years or more is prescribed." 18 U.S.C. § 3142(f)(1)(A). Thus, the Defendant's reliance on United States v. Abuhamra, 389 F.3d 309, 314 (2d Cir. 2004), although well-founded for an analysis of the law with regard to bail under section 3143(a)(1), is misplaced in that the case does not address section 3143(a)(2), which governs the release of this Defendant pending sentencing.

Section 3143(a)(2) in effect requires the remand of the Defendant in this case unless the Defendant can show: (1) "that there is a substantial likelihood that a motion for acquittal or new trial will be granted;" and (2) that the Defendant is unlikely to flee or pose a danger

under section 3143(a)(1). Here, the Defendant's motion for acquittal has been denied. In addition, the Court finds that under the circumstances there is not a substantial likelihood that a motion for a new trial will be granted. Accordingly, the Defendant has failed the first prong of the test under section 3143(a)(2), and as such, is required to be detained pending sentencing.

The only escape hatch for the Defendant is found in 18 U.S.C. § 3145, which permits the release pending sentence of some defendants, notwithstanding the provision of section 3143(a)(2), upon a showing of "exceptional reasons" why incarceration is inappropriate. Id.; see United States v. DiSomma, 951 F.2d 494, 496 (2d Cir. 1991). That provision states:

> A person subject to detention pursuant to section 3143(a) (2) or (b) (2), and who meets the conditions of release set forth in section 3143(a) (1) or (b) (1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

18 U.S.C. § 3145.

In Lea, the Second Circuit provided a clear and succinct summary of what a defendant needs to show to be released under sections 3143 and 3145 by stating:

> [A] defendant convicted of a crime of violence and awaiting sentencing who cannot satisfy the criteria set forth in § 3143(a)(2) may nevertheless be released if (1) the district court finds that the conditions of release set forth in § 3143(a)(1) have been met, and (2) it is clearly shown that there are exceptional reasons why [the defendant's] detention would not be appropriate.

Lea, 360 F.3d at 403 (citations, quotations, and footnotes omitted).

Few cases have interpreted the "exceptional reasons" provision in section 3145. What exactly qualifies as "exceptional reasons" depends upon a case by case analysis of the unique facts and circumstances that each defendant presents. See id.; DiSomma, 951 F.2d at 497. Exceptional circumstances may include "the presence of one or more remarkable and uncommon factors" or "a unique combination of circumstances giving rise to situations that are out of the ordinary." DiSomma, 951 F.2d at 497. A wide range of factors that a court may consider include: (1) the nature of the defendant's criminal conduct; (2) the defendant's prior record; (3) the length of the prison sentence; (4) circumstances that may render the hardships of prison unusually harsh, such as illness or injury; (5) the likelihood of success on a pending appeal; and (6) whether the defendant was unusually cooperative with the government. See United States v. Garcia, 340 F.3d 1013, 1018–22 (9th Cir. 2003).

Courts have generally held that "purely personal" reasons standing alone are insufficient to be considered "exceptional." United States v. Lippold, 175 F. Supp. 2d 537, 540 (S.D.N.Y. 2001) (collecting cases analyzing the "exceptional reasons" provision); see also Lea, 360 F.3d at 403–04 (stating that there is "nothing 'exceptional' about going to school, being employed, or being a first-time offender, either separately or in combination). In Lippold, the defendant argued that his exceptional reasons included that he was the father

of three young children whom he supported financially; that his seven-month old son had recently been diagnosed with Bell's Palsy; and that his employer needed him to train a replacement to handle his responsibilities. Lippold, 175 F. Supp 2d at 540. The court found these reasons insufficient to rise to the level of exceptional circumstances so as to justify release pending sentencing. Id. at 541.

In DiSomma, the Second Circuit affirmed the release of a defendant pending appeal pursuant to § 3145(c) where the defendant was convicted of conspiracy to rob a store but claimed on appeal that there was insufficient evidence of actual or threatened violence "because the theft was planned for a time when no one would be in the store." DiSomma, 951 F.2d at 496. The court reasoned that the appeal raised unusual legal or factual questions on appeal by alleging insufficient evidence of violence to sustain the conviction, the very element of the crime that barred release under the bail statute. Id. at 498.

The circumstances outlined in DiSomma, are not present in this case. The Court notes that "whether an appeal is likely to be successful is relevant to the determination of remand pending appeal, not sentencing." United States v. Lippold, 175 F. Supp. 2d 537, 539 (S.D.N.Y. 2001). Compare 18 U.S.C. § 3143(a) (standard for bail pending sentencing) with 18 U.S.C. § 3143(b) (standard for bail pending appeal); see also United States v. McAllister, 974 F.2d 291, 292 (2d Cir. 1992) (holding that § 3143(a) applies only to the district judge's own actions, not the likelihood of success on appeal). Here, the

Defendant is awaiting sentencing and an appeal is not yet pending. The Court has denied the Defendant's motion for judgment of acquittal and finds no likelihood of success on the merits of a motion for a new trial. The Court also notes that there was overwhelming evidence of guilt on the insurance fraud and creditor fraud counts. Thus, there are no pending legal or factual questions present in this case at the time that can be considered "exceptional reasons" for the purposes of this motion.

The Defendant argues that the number of community members offering their support and the fact that the defendant has a disabled son constitutes exceptional circumstances to warrant bail pending sentence. The sentencing guidelines recognize that a court may grant a departure for "exceptional family circumstances." See U.S.S.G. § 5G1.1(a). However, the Second Circuit has explained that departure is appropriate only "in especially compelling circumstances, and impermissible in less compelling circumstances, especially where other relatives could meet the family's needs, or the defendant's absence [does] not cause a 'particularly severe' hardship." United States v. Selioutsky, No. 04-2740, 2005 U.S. App. LEXIS 9745, at *14 (2d Cir. May 27, 2005) (citations omitted) (finding that the defendant's claim that his aged parents needed his physical presence in their home unexceptional); see also United States v. Smith, 331 F.3d 292, 294 (2d Cir. 2003) (finding nothing extraordinary about having a son in which the defendant was not the sole caregiver or financial supporter).

An example of "especially compelling circumstances" can be found in United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992), where the defendant "was solely responsible for the upbringing of her three young children, including an infant, and of the young child of her institutionalized daughter." Id. The Second Circuit noted that "[t]he number, age and circumstances of these children all support the finding that Johnson faced extraordinary parental responsibilities." Id. In contrast, compelling circumstances did not exist in United States v. Madrigal, 331 F.3d 258, 260 (2d Cir. 2003), where the defendant had six children and only one was younger than eighteen and suffered from a learning disability. In that case, the Second Circuit found that extraordinary circumstance did not exist because the family, including three older children and other extended family members, remained cohesive and were available to care for the young child. Id. The court noted that such circumstances are not "extraordinary," but are merely "the common collateral damage of imprisonment." Id.

The Defendant relies on United States v. Spero, 382 F.3d 803, 804 (8th Cir. 2004), to support his assertion that the defendant need not be the sole caregiver of a developmentally disabled child for a court to find exceptional family circumstances. In Spero, the defendant's wife was the primary caregiver of their autistic son, but the defendant's involvement with the child was characterized as a "key component" of his care because even the slightest change in routine "can cause him to become extremely upset and

violent." Id. The court noted that "[w]hen one parent is critical to a child's well-being, . . . that qualifies as an exceptional circumstance . . . ." Id. at 805. However, Spero is readily distinguishable from the facts in this case. The Defendant's son is an adult with Down Syndrome and is not an autistic child. Autism, as noted in the Spero case, is a disorder in which affected individuals "may adhere to inflexible, nonfunctional rituals or routine. They may become upset with even trivial changes in their environment." Id. at 804 n.3 (quoting PDR Medical Dictionary 171 (2d ed. 2000)).

In this case, although it is unfortunate that the Defendant's son will no longer have his father to care for him at home, the child has a mother and seven brothers and sisters, as well as a large extended family that appears to be cohesive and well suited to attend to his needs. Considering the facts presented, the Court finds that the Defendant's circumstances are not exceptional, but are more akin to "the common collateral damage of imprisonment" that many defendants encounter. In addition, the Court rejects, as a matter of law, the Defendant's argument that the large show of support from the local community constitutes the type of "exceptional circumstances" that are appropriate to warrant bail under the statute.

## II. CONCLUSION

For all the foregoing reasons, the Court finds that the Defendant is unable to show "exceptional reasons" to warrant release pending sentencing, and thus it is required under the terms of section 3143(a)(2) to detain the Defendant pending the imposition of sentence.

**SO ORDERED.**

Dated: Central Islip, New York
June 8, 2005

*/s/ Arthur D. Spatt*
ARTHUR D. SPATT
United States District Judge